NO. 21-15414

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARIO GURROLA and FERNANDO HERRERA,

Plaintiffs-Appellants,

v.

DAVID DUNCAN, in his official capacity as director of the California Emergency Medical Services Authority; et al.

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California,
The Honorable John A. Mendez, United States District Judge
E.D. Cal. Case No. 2:20-v-01238-JAM-DMC

ANSWERING BRIEF OF DEFENDANT-APPELLEE JEFFREY KEPPLE in his official capacity as Medical Director of Northern California EMS, Inc.

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I. INTRODUCTION

Dr. Jeffrey Kepple ("Dr. Kepple") is named in this case solely in his official capacity as Medical Director of Northern California EMS, Inc. ("Nor-Cal EMS"). Plaintiffs-Appellants DARIO GURROLA ("Gurrola") and FERNANDO HERRERA ("Herrera") admit that "[m]edical directors of local emergency medical services agencies, including Defendant[] KEPPLE . . . must and do follow these regulations. Dario's denial is just one example." ER-91, (¶ 97). On appeal, Gurrola and Herrera charge only one allegation against Dr. Kepple: "Nor-Cal EMS [was] prohibited from granting [Dario] an EMT certification, even on a probationary basis, based on his two felony convictions. ER-86[.] Dario emailed the agency, but neither he nor it could do anything." Appellants' Opening Brief ("AOB") at 11.

These admissions by Gurrola and Herrera should be grounds for the immediate dismissal of Dr. Kepple from this appeal. Appellants makes no allegation that Dr. Kepple misapplied or misunderstood the California Regulations at issue, or had any improper purpose in enforcing them. Put another way, Gurrola and Herrera's grievance is with California law, not with the public servant who faithfully applied and followed the law, and whose treatment of Gurrola's application for EMT certification was affirmed by a fair and full process in a hearing by an Administrative Law Judge ("ALJ").

Gurrola and Herrera did not need to file their suit in the district court to seek to

change the denial of EMT certification—they had, and still have, several other avenues of relief available, which they chose not to explore. Instead, they allege purported constitutional violations under the Equal Protection and Due Process clauses of the Fourteenth Amendment to the U.S. Constitution. They recklessly posit both as-applied and facial challenges, potentially posing to disrupt California's laws that protect citizens from repeat felons who seek certification in medical, public safety, education, and other essential positions.

Gurrola and Herrera give this Court no guidance as to the remedy it should grant, if any. The opening brief simply concludes: "The Court should reverse the dismissal, vacate the judgment below, and remand so that Dario and Fernando have the chance to prove their claims." AOB at 75.

By what standard would the remanded case be adjudicated? Would all prior felonies be removed from consideration? Should the district court rewrite the regulations to allow applicants who have fewer than *three* felonies to "categorically"[1] be eligible for EMT certification? Fewer than *ten*? That is not the district court's, nor this Court's, role. If the regulations are facially invalid, must EMT applicants await the arrival of amended regulations?

[1] As we discuss below, Gurrola and Herrera miscategorize the EMS qualification regulations as "categorical" bans. Would they have anyone, "categorically," to be eligible for EMT certification?

The opening brief appears to invite a much broader application, beyond Messrs. Gurrola and Herrera, by exhaustively and gratuitously burdening the Court with examples of extraneous regulations from near and far. If Appellants are seeking to invalidate *all* felony bans, they should plainly say so. If they want felons to be treated as a protected class for Equal Protection purposes, they must present a far more persuasive argument than they have made to this Court.

II. STATEMENT OF THE ISSUES

1. Is Dr. Kepple a proper defendant, though he had no discretion to ignore the challenged regulation in Gurrola's favor, and he took no action at all regarding Herrera?

2. Do Gurrola and Herrera lack standing since they could have sought individualized consideration under various other California procedures?

3. Are the challenged felony restrictions improper even though they are narrowly tailored and related to a person's fitness to be an EMT?

III. STATEMENT OF THE CASE

A. The Regulations at Issue

The regulations at issue in this case form an essential part of an overall plan, otherwise known as the Emergency Medical Services System and Prehospital Emergency Medical Care Personnel Act ("EMS Act"), found in Title 22 of the California Code of Regulations, Division 9 (Prehospital Emergency Medical Services), Chapter 6 (Process for EMT and Advanced EMT Disciplinary Action), Article 4

(Determination and Notification of Action). The California Legislature declared the need for such an omnibus plan in California Health and Safety Code section 1797.1:

> The Legislature finds and declares that it is the intent of this act to provide the state with a statewide system for emergency medical services by establishing within the Health and Welfare Agency the Emergency Medical Services Authority[2], which is responsible for the coordination and integration of all state activities concerning emergency medical services.

The EMS Authority's mandate to adopt regulations to effectuate the Legislature's intent is stated in Health and Safety Code section 1797.107:

> The authority shall adopt . . . such rules and regulations as may be reasonable and proper to carry out the purposes and intent of this division and to enable the authority to exercise the powers and perform the duties conferred upon it by this division not inconsistent with any of the provisions of any statute of this state.

The EMS Authority adopted California Code of Regulations section 100214.3 ("Section 100214.3"), entitled "Denial or Revocation of a Certificate," pursuant to the powers delegated to it by the Legislature. Section 100214.3 states, in relevant part:

> (a) [Inapplicable]
>
> (b) The medical director may deny or revoke any EMT or Advanced EMT certificate for disciplinary cause that have been investigated and verified by application of this Chapter.
>
> (c) The medical director *shall* deny or revoke an EMT or Advanced EMT certificate if any of the following apply to the applicant: . . .
>
> (3) Has been convicted of two (2) or more felonies. . . .

[2] Hereinafter, the "EMS Authority," for ease of reference.

> (6) Has been convicted and released from incarceration for said offense during the preceding ten (10) years for any offense punishable as a felony.
>
> (e) Subsection (a) and (b) shall not apply to convictions that have been pardoned by the Governor, and shall only apply to convictions where the applicant/certificate holder was prosecuted as an adult. . . . As used in this Section, "felony" or "offense punishable as a felony" refers to an offense for which the law prescribes imprisonment in the state prison as either an alternative or the sole penalty, regardless of the sentence the particular defendant received. . .
>
> (g) Nothing in this Section shall negate an individual's right to appeal a denial of an EMT or Advanced EMT certificate pursuant to this Chapter.

Appellants make no mention of subdivisions (e) and (g), which provide two of the available remedies for applicants who are denied EMT certification because of two unexpunged felonies on their records. Nor did Appellants file a petition for writ of mandate in a California Superior Court after the ALJ's ruling or seek relief in Penal Code sections 1203.4 or 1203.4b.

The EMS Authority is the first tier of a two-tiered system designed to implement the foregoing regulatory framework. Local governments do so through local emergency medical services agencies ("LEMSAs"). Cal. Health & Safety Code §§ 1797.204, 1797.250, 1797.252, 1797.254.

Nor-Cal EMS is one such LEMSA. Nor-Cal EMS is presently a private, nonprofit public benefit corporation. *See* Kepple RJN No. 1: Articles of Incorporation of Northern California EMS, Inc. Under California Health and Safety Code Section 1797.200 Nor-Cal EMS contracted with the California counties of Lassen, Modoc, Plumas, Sierra, and

Trinity to serve as their LEMSA, coordinating their emergency medical services system. *See* ER-38-39. As a LEMSA, Nor-Cal EMS is charged with evaluating the eligibility of applicants for EMT certification (Cal. Health & Safety Code § 1797.107), such as Mr. Gurrola.

B. Gurrola, a Four-Time Convicted Felon, Was Denied EMT Certification

Mr. Gurrola has an extensive criminal history, over a period of at least 11 years, including crimes committed as a juvenile and at least four felonies and two misdemeanors committed as an adult. ER-29-31.

In and around 2000, Gurrola had been in juvenile custody for unspecified crime(s). ER-91; AOB at p. 16. Then, in 2003, when Gurrola was 22 years old, the police were called to the scene of an argument between him and his ex-girlfriend. ER-32 (¶ 10). The police searched Gurrola, finding a kitchen knife in his pocket, which he states was for his protection. *Id.* As a result, Gurrola was convicted of his first felony, carrying a concealed dagger. ER-30-31. Only two years later, in 2005, while under the influence of drugs and alcohol, he assaulted a security guard. ER-33 (¶ 10); ER-84 (¶ 16). Gurrola says that he "did not drink like that again." ER-33 (¶ 10). He was convicted of felony assault with a deadly weapon. ER-30.

In 2008 Gurrola was convicted of resisting arrest, a misdemeanor, which was dismissed in December 2017 pursuant to California's general expungement statute, California Penal Code section 1203.4 ("Section 1203.4"). *Id.* Two years later, he stole

beer while intoxicated and then fought with some neighbors, creating a scene to which the police were called. ER-33 (¶10). For that conduct, he was convicted of felony burglary and misdemeanor petty theft, both of which were dismissed in December 2017 pursuant to Section 1203.4. *Id.* Finally, in 2011, Gurrola observed a fight and then picked up a pair of pants left on the ground, which he threw over his shoulder. *Id.* Police observed this and arrested him. *Id.* He was thereafter convicted of receipt of stolen property, a felony, which was reduced to a misdemeanor in May 2016 and then dismissed pursuant to Section 1203.4 in December 2017. ER-29.

Needless to say, Gurrola has not always been dedicated to the health and safety of his community. ER-83 (¶ 8).

Mr. Gurrola suggests that he became interested in firefighting in and around the year 2000 when he participated in the Conservation Camp Program while still in juvenile custody. ER-91 (¶ 83); AOB at 16. Gurrola omits to say whether he served in any other fire camps during his years of incarceration. *Id.* To his credit, Gurrola has served as a seasonal firefighter for various organizations since 2013. ER-85 (¶¶ 24-31). He has also earned various firefighting and EMT credentials. *Id.*

On August 8, 2019, Gurrola filed an application for EMT certification with Nor-Cal EMS. ER-29 (¶ 1). On October 10, 2019, Nor-Cal EMS denied the application due to Gurrola's significant criminal history, not just the two remaining felonies. *Id.* Gurrola appealed the agency's denial, and an ALJ conducted a full hearing on November 12,

2019 pursuant to the California Administrative Procedure Act. ER-28.

C. The ALJ Upheld the Denial of Gurrola's EMT Certification After a Thorough Evaluation of Gurrola's Criminal History

The ALJ issued her Proposed Decision on December 5, 2019. ER-37. In rendering a decision, the ALJ considered all of the evidence submitted by Gurrola, including course completion certificates related to firefighter and EMT training; completion of independent study courses; his résumé; three character reference letters (albeit from individuals who were unaware of his criminal history); as well as personal testimony regarding each of his convictions; his rehabilitation; and his education. ER-31-33.

Applying the factors set forth in Cal. Code of Regulations, title 22, § 100208 and weighing all the evidence, the ALJ determined that Gurrola's crimes "were serious and posed harm to the public. He deprived persons of their property . . . . He engaged in violent behavior . . . . [and] had been drinking when he committed some of his crimes." ER-34 (¶ 14). Further, his evidence of rehabilitation was not enough "to provide adequate assurances to Nor-Cal EMS that [Gurrola] can be issued an EMT Certification." ER-34 (¶ 15). As a result, the ALJ found that, pursuant to Health and Safety Code section 1798.200, subdivision (c)(6), Nor-Cal EMS had cause to deny EMT certification due to Gurrola's conviction of crimes substantially related to the functions and duties of EMT personnel. ER-37 (¶ 4). The ALJ further decided that Nor-

Cal EMS had additional cause due to Gurrola's two existing felony convictions, under Section 100214.3(c). ER-37(¶ 5).

Nor-Cal EMS transmitted the ALJ's Proposed Decision, and Nor-Cal EMS's Order of Decision, to Mr. Gurrola on December 11, 2019. ER-26-27. Gurrola did not appeal the decision or file a petition for writ of mandamus for judicial review of the administrative decision. ER-66.

D. Herrera Never Applied for EMT Certification from Nor-Cal EMS

Nor-Cal EMS has never received an application for EMT certification from Mr. Herrera. Herrera was convicted of two felonies—assault with a deadly weapon and witness tampering—and sentenced to prison. ER-87-88. While in prison, he served in a fire camp. ER-91 (¶ 84). He was released from prison in 2018 and completed parole in 2019. ER-88 (¶ 58). Herrera then took and passed an EMT training class in 2020, but has taken no further steps toward obtaining EMT certification because "he knows his record makes it pointless." ER-88 (¶¶ 62-63). Nor has he attempted to have his convictions set aside under Section 1203.4 or Assembly Bill 2147 ("AB 2147"), discussed below.

E. Neither Gurrola Nor Herrera Have Sought to Have Their Convictions Set Aside Under AB 2147

On September 11, 2020, Governor Gavin Newsom signed into law AB 2147, now California Penal Code Section 1203.4b ("Section 1203.4b"), which permits incarcerated persons who served as hand crew members in the California Conservation Camp

program to petition the Superior Court in the counties where they were convicted to "dismiss the accusations or information against the defendant and the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which the defendant has been convicted[.]" Cal. Penal Code § 1203.4b, subd. (c)(1). The court may grant such relief, "in its discretion and in the interest of justice[.]" *Id.*

When dismissal is granted, the incarcerated person "shall not be required to disclose the conviction on an application for licensure by any state or local agency." *Id.* § 1203.4b, subd. (b)(5)(A). "All convictions for which the defendant is serving a sentence at the time the defendant successfully participates in a program as specified in subdivision (a) are subject to relief pursuant to this section." *Id.* § 1203.4b, subd. (b)(4). However, "In any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if the accusation or information had not been dismissed." *Id.* § 1203.4b subd. (d)(1). Put simply, in a later offense, the dismissed conviction follows the former convict for life.

Gurrola alleged in the district court that Section 1203.4b does not apply to his felony convictions because his California Conservation Camp service was not during his incarceration for the two felonies still on his record. He clearly was serving a prison sentence during his California Conservation Camp service. Yet, he states that he "appears" to be ineligible for dismissal. ER-91 (¶ 87).

Neither Gurrola nor Herrera has provided any evidence that he availed himself of Section 1203.4b. Rather, they allege that the process would require them to file petitions in courts far from where they live (or find lawyers to do so), and those petitions could be denied according to the judges' discretion. ER-91 (¶ 88).

Both gentlemen have demonstrated that they know how to hire a lawyer. The distance to their former residences, San Diego County for Gurrola and Yuba County for Herrera (AOB at 7 and 13, respectively), are irrelevant, as the Section 1203.4b petition may be filed by an attorney (Cal. Penal Code § 1203.4b, subd. (c)(3)). Gurrola's attorney's firm has two offices in San Diego County, according to its website,[3] and Yuba County is in the Sacramento Division of the district court in which this action was filed. Gurrola's and Herrera's plea that seeking dismissal in the counties under Section 1203.4b is hollow, at best, and misleading to the Court.

F. Procedural History

Gurrola filed his Complaint in this case on June 19, 2020 against David Duncan, in his official capacity as the Director of the EMS Authority, and Dr. Kepple, in his official capacity as Medical Director of Nor-Cal EMS. FalckSER-029. Following the September 11, 2020 enactment of AB 2147, the First Amended Complaint ("FAC") was filed on September 15, 2020. ER-80. The FAC named Herrera as a second plaintiff, as

[3] *See* https://www.pillsburylaw.com/en/offices/.

well as Dr. Falck, in his official capacity as the Medical Director of the SSVEMS Agency, another LEMSA. ER-80.

On October 28, 2020, Defendants Kepple, Falck, and Duncan moved to dismiss the FAC. ER-114-115. The district court granted their motions on February 10, 2021. ER-4. Gurrola and Herrera filed their Notice of Appeal on March 8, 2021. ER-115.

IV. SUMMARY OF THE ARGUMENT

Dr. Kepple asserts that the judgment of the district court should be affirmed. First, the judgment should be affirmed because neither Gurrola nor Herrera have alleged a constitutional right to an EMT certification; Gurrola's deprivation of an EMT certification was not caused by an official policy of Nor-Cal EMS; and Dr. Kepple took no action whatsoever in regard to Herrera. Second, neither Gurrola nor Herrera have standing to bring their claims because they failed to appeal from the ALJ's judgment, to petition for a pardon, to petition a court to dismiss his felony convictions, or for 1203.4b relief. Third, the EMS Authority's tailored felony restrictions are rationally related to one's fitness to serve as a certified EMT.

V. ARGUMENT

A. Standard of Review

The Ninth Circuit reviews *de novo* a district court's dismissal of a case under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *Rodriguez v. Newsom*, 974 F.3d 998, 1003 (9th Cir. 2020). To survive a 12(b)(6) motion to dismiss,

a complaint must contain sufficient factual matter, accepted as true, to state a plausible claim for relief. *Id.* The Court may affirm a 12(b)(6) dismissal on any basis fairly supported by the record, even if the district court did not reach the issue or relied on different grounds or reasoning. *Williamson v. General Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000).

If an administrative decision can be upheld on any ground, it must be upheld. *See Wilson v. State Person. Bd.*, 58 Cal. App. 3d 865, 870 (1976). An administrative decision under review by a California trial court is subject to two possible standards of review depending upon the nature of the right involved. Cal. Code Civ. Proc. § 1094.5, subd. (c). If the administrative decision substantially affects a "fundamental vested right," the trial court must exercise its independent judgment on the evidence. *Clerici v. Dep't of Motor Vehicles*, 224 Cal. App. 3d 1016, 1023 (1990). If the administrative decision neither involves nor substantially affects a vested right, the trial court's review is limited to determining whether the administrative findings are supported by substantial evidence. *Id.* The denial of a professional license to a previously unlicensed person does not affect a fundamental, vested right, and the substantial evidence test should be used. *Id.*

In review of a state agency decision, this Court generally applies a highly deferential standard of review and is confined to the administrative record. *See Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471-1472 (9th Cir. 1993). This Court

should make a bounded, independent decision – "bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of evidence before the court." *Id.* (quoting *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 791 (1st Cir. 1984)).

B. The Judgment for Dr. Kepple Should Be Affirmed Because Dr. Kepple Is Not a Proper Defendant

Dr. Falck eloquently asserts that he is not a proper defendant under *Monell v. Dep't of Soc. Servs. Of City of New York*, 463 U.S. 658 (1978). *See* Answering Brief of Dr. Troy Falck ("FAB") at 10. Dr. Kepple asserts the same. Judgment for Dr. Kepple should be affirmed because neither Gurrola nor Herrera have alleged a constitutional right to an EMT certification; further, Gurrola's deprivation of an EMT certification was not caused by an official policy created by Nor-Cal EMS; and, finally, Dr. Kepple took no action whatsoever in regard to Herrera.

1. Dr. Kepple Is Not a Proper Defendant Because He Did Not Have Discretion to Contravene California Law to Gurrola's Benefit

An official-capacity suit is an action against an entity of which the officer is an agent. *Monell,* 463 U.S. at 690, n. 55. The FAC, which names Dr. Kepple "in his official capacity as medical director of Northern California EMS, Inc.," is an action against Nor-Cal EMS. *See* ER-80.

Nor-Cal EMS is a private, nonprofit public benefit corporation that contracted with various California counties to serve as the LEMSA. *See* Kepple RJN No. 1; ER-

83 (¶ 11). As a private entity, it may be subject to Section 1983 challenges to the extent it acts under color of state law. *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012).

For liability to attach under Section 1983 the alleged constitutional violation must be caused by an official policy of the entity. *Sandoval v. County of Sonoma*, 912 F.3d 509, 517 (9th Cir. 2018) (citing *Monell*, 436 U.S. at 691). A policy is "a deliberate choice to follow a course of action . . . made from among various alternatives by the official . . . responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 470 (1986). In other words, the official must have had discretion to implement said policy. When an agency or entity exercises no discretion and merely complies with a mandatory state law, the constitutional violation is not caused by the official policy of the agency. *See Aliser v. SEIU California*, 419 F. Supp. 3d 1161, 1165 (N.D. Cal. 2019) (citing *Vives v. City of New York*, 524 F.3d 346, 353 (2d Cir. 2008); *Evers v. County of Custer*, 745 F.2d 1196, 1203 (9th Cir. 1984); *Sandoval*, 912 F.3d at 518).

The challenged regulation states that the medical director "shall deny" an EMT certificate if an applicant has been convicted of two or more felonies. *See Aliser*, 419 F.Supp.3d at 1165 (quoting similar mandatory statutory language). Gurrola has not alleged, nor can he, that Dr. Kepple had discretion to disobey the regulations. Indeed, Gurrola directly attributes the denial of his application for EMT certification to the

challenged regulation. *See* ER-96 ("If the ban were removed, Dario would obtain his EMT certification[.]"); AOB at 3-4 ("By regulation, the state refuses to certify people with two or more felony convictions forever. 22 Cal. Code Regs. § 100214.3(c)(3).") Without a showing that Dr. Kepple had discretion to certify Appellant, Mr. Gurrola is not entitled to prospective or retrospective relief, and the judgment in his favor must be affirmed. *See Los Angeles v. Humphries*, 562 U.S. 29, 37 (2010).

2. Dr. Kepple Is Not a Proper Defendant Because He Took No Action Against Herrera, and Herrera Has No Standing to Sue Him

In entertaining a suit, a court's threshold question is whether plaintiffs have standing to sue. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Under Article III of the U.S. Constitution, "standing is an essential and unchanging part of the case-or-controversy requirement[.]" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Appellants must show that they suffered an injury in fact; that the injury is fairly traceable to the challenged conduct; and that the injury is likely to be "redressed by a favorable decision." *Warth*, 422 U.S. at 560-561. As the Supreme Court teaches, a future act must be "certainly impending" to satisfy the injury-in-fact requirement. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

The district court found that Mr. Herrera has standing to pursue this claim. We respectfully submit that this finding was in error. Plaintiff Herrera admits that he has not applied for EMT certification. AOB at 17 n.6; ER-91-92 (¶ 88). As a result, Mr. Herrera fails to establish that Dr. Kepple deprived him of any right. Dr. Kepple made

no deliberate choice, nor could he. He did not even apply the law with respect to Herrera. *See* AOB at 12-14. Moreover, if Herrera *had* applied for certification with Nor-Cal EMS, Dr. Kepple would have to follow state law, not some policy of his creation. As a result, the judgment in favor of Dr. Kepple must be affirmed as to Herrera.

C. The Judgment for Dr. Kepple Should Be Affirmed Because Gurrola and Herrera Lack Standing, As They Could Have Sought Individualized Consideration Under California Procedures

The California Legislature has already provided at least five avenues by which Messrs. Gurrola and Herrera could have requested a release from their disqualification and penalties flowing from his prior felony convictions. These avenues provide for the individualized consideration Appellants here seek. Further, if granted, any of these state-law remedies would have broader positive consequences than the one they seek in this lawsuit.

1. Neither Gurrola Nor Herrera Petitioned for a Certificate of Rehabilitation or a Direct Pardon

One such procedure that Gurrola and Herrera could have employed is filing a petition for a Certificate of Rehabilitation pursuant to California Penal Code section 4852.01, et seq. Conveniently, such petitions would be filed in the superior court of the counties in which they now live, not where the felonies were committed. *See* Cal. Penal Code § 4852.06. Their petitions could be lodged without personal expense and with professional assistance. *See* Cal. Penal Code §§ 4852.04, 4852.08, 4852.09.

In determining whether to grant a certificate of rehabilitation, the superior court would consider records and testimony regarding the nature of Appellants' crimes, their conduct during and following his release from prison, and their rehabilitation. *See* Cal. Penal Code §§ 4852.1, 4852.11, and 4852.12. If granted, the court would then issue an order declaring them rehabilitated and recommending that the Governor of California grant a full pardon. *Id.* § 4852.13.

Alternatively, California Penal Code section 4800, et seq., authorizes the making of a pardon application directly to the Governor. In the case of a twice-convicted felon, the Governor cannot grant a pardon "except on recommendation of the Supreme Court, 4 judges concurring." Cal. Const., art. V, § 8, subd. (a). The application form for a pardon from the Governor asks an applicant to describe his convictions, his age at the time of the crimes committed, the circumstances of the crimes, the impact a pardon would have on his life (including employment opportunities), his post-conviction conduct, and his efforts at rehabilitation and self-development. Kepple RJN No. 2: Application for Pardon. Every individual circumstance cited by Gurrola and Herrera in this case, including rehabilitation, would be considered by the Governor. AOB at 38-40.

Following receipt of the application, the Governor would then transmit the application to the Board of Parole Hearings for a "full and complete investigation," which could include review of the application, review of summaries of fact and

recommendations from the judge of the court in which Appellants were convicted, review of all records of relevant judicial proceedings, and consideration of witness testimony. *Id.* §§ 4802, 4803, and 4812. The Board of Parole Hearings' written recommendation would then be transmitted to the Governor, who would decide whether to forward the entire application to the Supreme Court of California for its consideration. *Id.* §§ 4813, 4850, 4851. The California Supreme Court has stated that its "only role is to ensure that the application has sufficient support that the exercise of the [Governor's clemency] power would not be improper." Kepple RJN No. 3: Admin. Order 2018-03-28 at 8.

Two-felony restrictions are not unique to the Governor's power to pardon convicted criminals. In March 2018, the California Supreme Court, *en banc*, issued Administrative Order 2018-03-28, which discusses the Court's proper, limited, role in decisions to pardon felons, and the historical framework for Article V, Section 8, which directly limits the Governor's ability to grant clemency to twice-convicted felons. Kepple RJN No. 3: Admin. Order 2018-03-28 at 8. The Court noted that in California's second constitutional convention (1878-1879) the drafters were concerned about the Governor's power to pardon repeat felons:

> First, the delegates' primary concern in adopting what is now article V, section 8, was to provide some check on the arbitrary use of the pardon power in the case of twice-convicted felons.

Id. at 6.

The state high court described its role in the pardon process as follows:

> The role of this court under article V, section 8, is not to express a substantive view on the merits of an application; the court takes no position on whether the Governor should, as an act of mercy or otherwise, extend clemency to a particular applicant. It is, rather, to perform a more traditional judicial function: to determine whether the applicant's claim has sufficient support that an act of executive clemency, should the Governor choose to grant it, would not represent an abuse of that power.
>
> *Id*. at 1.

For more than 140 years the California constitution has expressed the state's concerns regarding repeat felons. Then and today, the state Supreme Court's role in the pardon process is only to ensure that the executive does not abuse that power. In the present case, there is every reason for optimism that the Court would agree with the Governor.

If Gurrola's and Herrera's applications for a certificate of rehabilitation and pardon were granted, they would be relieved of many of the penalties that accompany their prior convictions. Such penalties include, but are not limited to, disqualification from jury service (Cal. Civ. Proc. Code § 203, subd. (a)(5)); impeachment as a witness (Cal. Evid. Code § 688); and disqualification from holding office as a parole or probation officer (Cal. Gov. Code § 1029(b)).[4]

[4] *See also, In re Lavine*, 2 Cal. 2d 324, 329 (1935) (stating that a pardon "puts the offender in the same position as though what he had done never had been unlawful, but it does not close the judicial eye to the fact that once he had done an act which

2. Neither Gurrola Nor Herrera Availed Themselves of Relief Under Other California Procedures

Gurrola and Herrera fail to state that, as to their relevant felony convictions, they sought relief available to them under other California procedures. Gurrola did not appeal or challenge the ALJ's decision by petitioning for a writ of mandate. Further, it is not apparent that he sought to have his relevant felony convictions expunged pursuant to Section 1203.4, or that he could not have had them expunged pursuant to Section 1203.4b. The same can be said of Herrera. The judgment for Dr. Kepple should be affirmed for Gurrola's and Herrera's lack of standing.

D. The Judgment for Dr. Kepple Should Be Affirmed Because the EMS Authority Had Rational Bases for Promulgating Tailored Felony Restrictions

The EMS Authority was specifically charged by the California Legislature with regulating EMT certification. This Court should defer to the EMS Authority's judgment and find that it could have had, and, indeed, did have, at least one rational basis for promulgating its tailored and individualized felony restrictions.

1. The Challenged Regulations Are Not Flat Bans on Felonies, But Narrowly Tailored Felony Restrictions

Section 100214.3 sets forth a range of criminal conviction restrictions, not "flat" felony bans, as suggested by Appellants.

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constituted an offense. . . The very essence of a pardon is forgiveness or remission of penalty. . . . It implies guilt, and does not wash out the moral stain.") (citations omitted).

Section 100214.3 provides for individualized consideration to prior felons, to individuals with prior misdemeanors, and to non-criminally convicted individuals. It does not "ban" all individuals with a felony conviction from obtaining certification; instead, it is a narrowly-defined fitness determination applicable to all people, with available "outs" through state judicial dismissals of felony judgments, the Governor's power to pardon, and the Legislature's recent recognition that incarcerated fire fighters who individually prove themselves to be rehabilitated should have a path to a clean record.

The regulations at issue, Section 100214.3(c)(3) and (6) take individualized consideration of the number and recency of felonies committed, which the EMS Authority has decided are directly tied to the fitness of the applicant. These regulatory decisions are entitled to deference from the Court. *See Barsky v. Board of Regents*, 347 U.S. 442 (1954) ("[T]he state has sought to attain its justifiable end by making the conviction of any crime a violation of its professional medical standards, and then leaving it to a qualified board of doctors to determine initially the measure of discipline to be applied to the offending practitioner.").

Courts nationwide have upheld felony restrictions. Of the 17 "felony-history ban" cases provided in the AOB, five arise under the jurisdiction of the Commonwealth of

Pennsylvania by way of state constitutional challenge.[5] *See* AOB at 27-29. In those cases, which are arguably Gurrola's and Herrera's most factually persuasive, challenges to Pennsylvania's Constitution are "analyzed more closely under the rational basis test than due process challenges under the United States Constitution." *See Peake v. Pennsylvania*, 132 A.3d 506, 518 (Pa. Commw. Ct. 2015) (stating further that "[i]n the rational basis test used in equal protection and due process challenges brought under the United States Constitution . . . it matters not whether a statutory classification will have some inequitable results.") The same can be said of *Shimose v. Haw. Health Sys. Corp.*, 345 P.3d 145 (Haw. 2015), which applied a rational basis test that is not as deferential as the one to be applied here. *See Wright v. Home Depot U.S.A., Inc.*, 111 Hawai'i 401, 412 n.9 (2006).

Gurrola's and Herrera's other cases are not helpful to them. In *Fields v. Dept't of Early Learning*,434 P.3d 999, 1007 (Wash. 2019), for example, the plaintiff succeeded on a procedural due process claim, but the court concluded that they "do not question the authority of administrative agencies to set generally applicable regulations governing the qualifications of people who work with vulnerable populations[.]"

[5] *Nixon v. Pennsylvania*, 839 A.2d 277 (Pa. 2003) (providing eldercare); *Peake v. Pennsylvania*, 132 A.3d 506 (Pa. Commw. Ct. 2015) (providing eldercare); *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Commw. Ct. 2012) (working in a public school); *Warren Cnty. Hum. Servs. v. State Civ. Serv. Comm'n*, 844 A.2d 70 (Pa. Commw. Ct. 2004) (providing child-protective services); *Sec'y of Revenue v. John's Vending Corp.*, 309 A.2d 358 (Pa. 1973).

Following that reasoning, the court in *Fields* would not find the subject regulations in this case unconstitutional.

All other cases cited regard laws prohibiting *any and all* felons from being licensed in non-medical professions, not just those that are inherently distinguishable on the grounds that they are repeat offenders or recently committed their crime. *See Chunn v. State, ex rel. Mississippi Dept. of Ins.*, 156 So.3d 884 (all felons prevented from obtaining a bail-agent license); *Barletta v. Rilling*, 973 F. Supp. 2d 132 (D. Conn. 2013) (all felons prevented from licensure to trade in precious metals); *Furst v. New York City Transit Auth.*, 631 F. Supp. 1331, 1338 (E.D.N.Y 1986) (all felons prevented from working municipal jobs); *Kindem v. City of Alameda*, 502 F. Supp. 1108 (N.D. Cal. 1980) (all felons prevented from working municipal jobs); *Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974) (all felons prevented from civil service); *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977) (all felons prevented from becoming licensed detectives or security guards); and *Gregg v. Lawson*, 732 F. Supp. 849 (E.D. Tenn. 1989) (all felons prevented from being on state wrecker call list). Unlike these cases, the regulations at issue do not ban *all* felons; they distinguish based on number and recency of felonies committed, and they are rationally related to an applicant's fitness to serve as a certified EMT in California.

The cases that Appellants cite do more to hurt than help their case.

2. The Challenged Regulations Are Rationally Related to Gurrola's and Herrera's Fitness to Serve as Certified EMTs

In challenging the constitutionality of the subject regulations, Appellants bear a heavy burden, which they fail to carry. A state's regulation of entry into a licensed profession must be rationally related to an applicant's fitness or capacity to practice that profession. Here the regulations are directly relevant. *See Dittman v. California*, 191 F.3d 1020, 1031 (9th Cir. 1997) (citing *Schware v. Board of Bar Examiners of the State of New Mexico* 353 U.S. 232, 239). The Supreme Court of the United States, and other courts, have a long history of deferring to legislative classifications in the regulation of licensed professions. *Lupert v. California State Bar*, 761 F.2d 1325, 1328 (9th Cir. 1985) (citing *Williamson v. Lee Optical*, 348 U.S. 483, 487-498 (1955); *Watson v. Maryland*, 218 U.S. 173, 177 (1910); *Ohralik v. State Bar Ass'n.*, 436 U.S. 447, 460 (1978)).

Where, as here, a challenged legislative act does not violate a fundamental right, the Court looks to see whether the government "could have had a legitimate reason for acting as it did." *Dittman v. California*, 191 F.3d 1020, 1031 (9th Cir. 1999) (citing *Kim v. United States*, 121 F.3d 1269, 1274 (9th Cir. 1997) ("The government need not state its purposes at the time it acts."). Stated differently, Appellants must show that the facts on which the regulation is based "could not reasonably be conceived to be true by the governmental decisionmaker." *Lupert*, 761 F.2d at 1328.

Through the EMS Act, the California legislature vested the EMS Authority with responsibility to coordinate statewide EMS services. *See* Cal. Health & Safety Code §§ 1791.1, 1797.4, 1797.6, 1797.100. The EMS Authority was further vested with establishing professional standards and promulgating regulations regarding emergency medical technicians. *See id.*, § 1797.54, 1797.107, 1797.109, 1797.170, 1797.208. The EMS Authority promulgated the regulations at issue, namely Cal. Code Regs. tit. 22, § 100214.3(c)(3) and (c)(6).

Cal. Code Regs. title 22, § 100208 states that, for the purposes of a denial, pursuant to Section 1798.200(c) of the Health and Safety Code, a crime "is considered to be substantially related to the qualifications, functions, or duties of a certificate holder if to a substantial degree it evidences unfitness of a certificate holder to perform the functions authorized by the certificate in that it poses a threat to the public health and safety." Under 100214.3(c)(3) and (c)(6), the medical director is required by the EMS Authority to deny certification should an applicant have a record of such conduct. The EMS Authority has determined that those stated criteria – two felony convictions or conviction and release from incarceration during the preceding ten years – pose a threat to public health and safety, thereby evidencing an unfitness to gain certification as an EMT.

This determination – that EMTs with multiple and recent felony convictions pose a threat to public health and safety – is, unfortunately, grounded in reality. Multiple

offenders are statistically likely to reoffend, with California's recidivism rates being some of the *highest ever recorded*. *See* Brief Amicus Curiae of Pacific Legal Foundation at 10. Unlike the "felony-history ban" cases proffered by Gurrola and Herrera, the number and recency of the felonies are inherent "distinctions beyond the classification of felon." *Barletta v. Rilling*, 973 F. Supp. 2d 132, 138 (2013).

Public health and safety, however, is not the only rational basis that the EMS Authority could have articulated. The recent commission of a felony, or the commission of multiple felonies, would further call into question a person's moral character and trustworthiness, which are, again, essential characteristics for professionals entrusted with the care of the vulnerable. *See Dittman*, 191 F.3d at 1032 ("A state may require good moral character as a qualification for entry into a profession, when the practitioners of the profession come into close contact with patients or clients.").

As the Supreme Court commented in *Hawker v. New York*, 170 U.S. 189, 196 (1898):

> When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to subject-matter, but is only appealing to a well-recognized fact of human experience[.]

See also, *Matanky v. Board of Medical Examiners*, 79 Cal. App. 3d 293, 305 (1978) ("Intentional dishonesty . . . demonstrates a lack of moral character and satisfies a finding of unfitness to practice medicine."); see also *Furnish v. Board of Medical Examiners*, 149 Cal. App. 2d 326, 332 (1957) ("[A] felony is an independent ground

for disciplinary action without regard to whether moral turpitude was in fact involved[.]").

The recent commission of a felony, whatever the type, has been held to reflect a lack of sound personal and professional judgment, which those who serve vulnerable individuals and communities-at-large, must have. *See Moustafa v. Board of Registered Nursing*, 29 Cal. App. 5th 1119, 1138-1140 (2018) (nurse's multiple theft convictions evidenced unprofessional conduct and unfitness to practice consistently with the public health, safety, and welfare); *Griffiths v. Superior Ct.*, 96 Cal. App. 4th 757, 770 (2002) (physician's two misdemeanor convictions involving alcohol consumption reflected lack of sound judgment relevant to a physician's fitness to practice medicine).

Common sense dictates that EMTs be particularly trustworthy people. EMTs have access to prescription medication, including narcotics. They use sharp objects and have ready access to them. At times they take actions that make the difference between life and death. They deal with people when they are most vulnerable and at their worst due to pain, high emotions, and confinement during transport.

The EMS Authority, as the governmental decisionmaker with specific expertise in the challenges and requirements of emergency medical services, is entitled to deference for its legitimate, professional decision. Thus, the judgment should be affirmed.

E. Gurrola and Herrera Should Not Be Granted Leave to Amend

Appellants failed to seek leave to amend in the court below or to suggest on appeal that additional facts could be provided in support of their claims. FAB at 24; FalckSER-8-22. Appellate courts do not remand in such a circumstance. *See Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1144 (2015). Mr. Gurrola and Mr. Herrera should be provided no such opportunity here.

VI. CONCLUSION

Appellants are in the wrong court and requesting the wrong remedy.

This Court could remand the case to the district court—though it should not—but cannot expunge their felony records or restore to them all the privileges they could have enjoyed if they had not repeatedly run afoul of the law. Nor can it detract from the California Constitution, if it does not directly abrogate recognized federal rights.

Appellants had other paths open to them, and still do. Though the record casts no doubt on Mr. Gurrola's claim that he is rehabilitated, that is a judgment better left to the professionals who work with EMTs daily and know the stresses and temptations they face. He can achieve his dream without attacking a legitimate and rational law.

Dr. Kepple respectfully requests that his dismissal from this case by the district court be affirmed, and that California's statutory and regulatory framework for EMT licensing be left undisturbed.

DATED: August 16, 2021 KAUFMAN DOLOWICH & VOLUCK, LLP

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable type-volume limitation from Fed. R. App. P. 32(a)(7). The brief contains 7,333 words. It is written in 14-point Times New Roman.

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STATEMENT OF RELATED CASES

Appellee is unaware of any related cases, within the meaning of Circuit Rule 28-2.6, pending in this Court.

DATED: August 16, 2021 KAUFMAN DOLOWICH & VOLUCK, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kris Wood
Kris Wood